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NOTES.

EFFECT OF RETIREMENT OF PARTNER UPON PARTNERSHIP OBLIGATIONS.—Since it is to be presumed that a person in the course of acquiring rights or incurring liabilities, takes into consideraton all the securities which the law affords him under the particular circumstances of the transaction in hand, so in becoming the obligee of a partnership, he may be said to rely upon the joint liability of the partners with respect to the obligations which they incur.[1] That the partners should be powerless by their own act, to affect the creditor's rights as to such obligations,[2] would, in plainest deference to the fundamental principles of contracts, seem obvious. This limitation would not, however, affect their competency to vary their reciprocal relations, as in the case of dissolution of a partnership by the retirement of one of the partners. In this event, the continuing partner, who, upon transfer of the assets, assumes the discharge of the partnership debts, cannot, in the face of such agreement, demand that the retired partner respond primarily for the payment of their obliga-

[1]Briggs *v.* Briggs & Vose (1857) 15 N. Y. 471.

[2]Smith *v.* Jameson (1794) 5 T. R. 601; Dean & Co. *v.* Collins (1906) 15 N. D. 535; Lindley, Partnership 323.

tions.[3] As between themselves, the continuing partner thereupon becomes by operation of law the principal debtor and the retired partner merely a surety,[4] the latter acquiring as such the right of reimbursement upon payment of the partnership debt,[5] and all the equities against his principal requisite to his protection in that capacity.[6] In pure cases of suretyship the relation of principal debtor and surety having concern primarily with the rights of the parties occupying such positions, the creditor without notice of the relation is not affected in his proceeding to enforce the obligation.[7] Where, however, the creditor has notice of the existence of this relation, he is bound to respect the equity of the surety, so far as consistent with his own rights, whether he assent or not,[8] and any act on his part, working a prejudice to the security would operate to discharge the latter,[9] for in such event the surety, theretofore uninvolved in the transaction, by agreement affords additional security to the creditor, and is in return therefore entitled to considerate treatment.[10] There is grave doubt, however, whether the same is true with respect to that relation, arising by operation of law upon the retirement of a partner. The parties occupying this relation were, at the time the obligation was incurred, known joint debtors, and strictly there would seem to be no equitable considerations binding upon the creditor, in favor of a partner attempting to convert his primary liability into a secondary one.[11] To allow the retired partner to be discharged according to principles of suretyship would seem a lax application of these principles in derogation of the creditor's rights. In adopting this position, a majority of the jurisdictions refuse to bind the creditor upon notice.[12] The view requiring the creditor to respect this relation, apparently first approved and adopted in New York,[13] has, however, been followed in a number of jurisdiction[14] and has met with favor in

[3]Brandt, Suretyship § 46.

[4]Savage *v.* Putnam (1865) 32 N. Y. 501; Morss *v.* Gleason (1876) 64 N. Y. 204; Dean & Co. *v.* Collins *supra.*

[5]Sizer *v.* Ray (1881) 87 N. Y. 220; Brandt, Suretyship § 226.

[6]Waddington *v.* Vredenbergh (N. Y. 1801) 2 Johns. Cas. 227; Menagh *v.* Whitwell (1873) 52 N. Y. 146; Morss *v.* Gleason *supra.*

[7]U. S. Nat. Bank *v.* Underwood (N. Y. 1896) 2 App. Div. 342.

[8]Grow *v.* Garlock (1884) 97 N. Y. 81; Overend etc. Co. *v.* Oriental etc. Corp. (1874) L. R. 7 H. L. 348.

[9]Overend etc. Co. *v.* Oriental etc. Corp. *supra;* Place *v.* McIlvain (1868) 38 N. Y. 96. Of course, the creditor may become bound to respect this relation where he consents thereto, whether by novation, Waydell *v.* Luer (N. Y. 1846) 3 Den. 410, or by assent giving rise to estoppel. Colgrove *v.* Tallman (N. Y. 1869) 2 Lans. 97. Mere assent would seem to be insufficient. Bronx etc. *v.* Wallenstein (1903) 84 N. Y. Supp. 924; but see Lodge *v.* Dicas (1820) 3 B. & Ald. 611.

[10]Grow *v.* Garlock *supra;* Rawson *v.* Taylor (1876) 30 Oh. St. 389.

[11]Briggs *v.* Briggs & Vose *supra;* Parsons, Principles of Partnership § 153.

[12]Dean & Co. *v.* Collins *supra;* Shapleigh Hardware Co. *v.* Wells (1896) 90 Tex. 110; Rawson *v.* Taylor *supra.*

[13]See Savage *v.* Putnam *supra;* Millerd *v.* Thorn (1874) 56 N. Y. 402; Colgrove *v.* Tallman (1876) 67 N. Y. 95.

[14]Smith *v.* Shelden (1876) 35 Mich. 42; Preston *v.* Garrard (1904) 120 Ga. 689.

England.[15] It seems to derive its source from doubtful authority,[16] and in so far as supported by cases involving a discharge of the obligation with respect to the continuing partner, constitutes an unnecessary application of the rules of suretyship,[17] on the familiar principle that the discharge of one of two joint-obligors discharges the other. The application of the rule to cases where the retired partner is prejudiced and therefore discharged, although militating against the proposition which denies the power of joint debtors by co-operation to affect the rights of the creditor, has convincing grounds of justification as a working rule, however unjustifiable in theory at least its adoption may originally have been.[18] Viewed from an equitable standpoint, it does not seem improper to protect the retired partner, of whose position the creditor has notice, and whose rights the latter may preserve from prejudice by proper action perfectly consonant with his own substantial rights.[19] Nor would it seem just to afford the creditor and continuing partner an opportunity of combination with the effect of burdening the retired partner.[20]

The New York view, then, finds its justification in that it protects the retired partner from prejudice resulting from conduct which, on the part of a creditor with notice is, under the circumstances, deemed inequitable.[21] Its extent should, therefore, be limited to the necessity of the circumstances leading to its adoption, and where the creditor has in the light of notice, acted in no wise inequitably, it would seem that, irrespective of the propriety of joining principal debtor and surety when jointly obligated,[22] he should be at liberty to join the continuing and retired partners in a suit on the partnership obligation.[23] In a recent New York case, *Phillips* v. *Mendelsohn* (1910) 121 N. Y. Supp. 913, a joint judgment obtained upon a partnership obligation was reversed as to the retired partner, on the ground that the continuing partner having assumed the partnership obligation, was primarily liable, and that until the creditor had exhausted his remedies against him, the retired partner should not be sued. It is submitted, however, that in favoring a joint recovery, the dissenting opinion is preferable as suggesting an exposition rather than a limitation of the New York rule, consistent with the decisions of the court of last resort.[24]

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[15]Rouse *v.* Bradford Banking Co. L. R. [1894] App. Cas. 586 *semble;* but *cf.* Smith *v.* Jameson *supra;* Swire *v.* Redman (1876) L. R. 1 Q. B. D. 536.

[16]Oakley *v.* Pasheller (1836) 4 Cl. & F. 207; Colgrove *v.* Tallman (N. Y. 1869) 2 Lans. 97.

[17]Other supporting cases have to do merely with the relation of principal debtor and surety as affecting the parties *inter se.* Savage *v.* Putnam *supra;* Morss *v.* Gleason *supra;* see Grow *v.* Garlock *supra;* Overend etc. Co. *v.* Oriental etc. Corp. *supra.*

[18]See cases in note 17 *supra.*

[19]Williams *v.* Bush (N. Y. 1841) 1 Hill 623.

[20]*Ibid.*

[21]Fillipini *v.* Stead (1893) 4 Misc. 405; Remsen *v.* Beekman (1862) 25 N. Y. 552; Bedford *v.* Deakin (1818) 2 B. & Ald. 210.

[22]See Perkins *v.* Goodman (N. Y. 1855) 21 Barb. 218.

[23]Briggs *v.* Briggs & Vose *supra;* Palmer *v.* Purdy (1880) 83 N. Y. 144; Bronx etc. Co. *v.* Wallenstein *supra;* Bedford *v.* Deakin *supra;* Murray *v.* Mumford (N. Y. 1826) 6 Cow. 441; Dobbin *v.* Foster (1844) 1 Car. & K. 323.

[24]Palmer *v.* Purdy *supra;* Millerd *v.* Thorn *supra;* Morss *v.* Gleason *supra;* Colgrove *v.* Tallman *supra;* Remsen *v.* Beekman *supra.*